



Prosecuting Attorneys Association of Michigan

116 W. Ottawa Street – Suite 200
Lansing, Michigan 48913
(517) 334-6060 – Fax (517) 334-6351
www.michiganprosecutor.org

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January 7, 2020

Justices of the Michigan Supreme Court
Supreme Court Clerk
P.O. Box 30052
Lansing, MI 48909

RE: ADM File No. 2018-29

Dear Justices,

The proposed amendments to MCR 6.302 and 6.610 eliminate the ability of a defendant to offer a factual basis satisfying the elements of the offense charged as an alternative to the lesser offense that will become his or her conviction of record. The practical impact of this proposal would be to severely restrict the plea negotiation process to the detriment of both the defendant and the prosecutor. Accordingly, PAAM opposes the proposed changes.

The benefits of negotiated plea agreements to resolve criminal cases short of trial are numerous and well-known to this Court. Defendants can minimize their exposure to incarceration and receive shorter sentences. Crime victims may be spared the experience of testifying about a traumatic experience and can take comfort in the finality that a plea agreement brings. Trial courts may move cases expeditiously through the system, allowing those defendants whose guilt is not at issue to waive their right to a trial and be sentenced quickly.

The parties to a criminal case are in the best position to negotiate a meaningful and appropriate plea resolution, taking into account the interests of the defendant, the interests of justice, the safety of the public, and the input from the victim(s) of the crime. MCR 6.302 and 6.610, as presently worded, allow the parties to do this and to satisfy the requirement that there be an accurate factual basis placed on the record to support a guilty plea.

Many criminal courts throughout the state do not entertain sentence agreements. Therefore, all negotiation occurs in the decision of what lesser charge to offer as a plea. There are many factual situations where both sides of a criminal case are served by a plea to a lesser offense, but the factual elements of that lesser offense are not present in the criminal

incident, necessitating a factual basis to the charged offense. A few examples illustrate:

- A defendant has sexually penetrated a 12-year-old-child and is ultimately charged with Criminal Sexual Conduct First Degree. The sentencing ranges that would result from a plea to Criminal Sexual Conduct 2nd Degree, Attempted Criminal Sexual Conduct First Degree, or Assault with Intent to Commit Sexual Penetration—which are the only crimes for which the defendant could make a factual basis under the proposed amendment—are all too low to serve the interests of the People and the victim. Accordingly, the People offer a plea to Criminal Sexual Conduct Third Degree. However, under the proposed amendment, the defendant could not make an accurate factual basis because the victim is under the age of 13.
- A defendant is charged with Felonious Assault, a four-year felony, for threatening a victim with a weapon. The parties wish to resolve the case with a plea to Aggravated Assault, a one-year misdemeanor. But because the victim suffered no aggravated injury as required for the misdemeanor, the defendant would be unable to provide a factual basis to the lesser charge.
- A defendant is charged with Criminal Sexual Conduct Third Degree based solely on a statutory rape theory. While the parties might wish to resolve the case with a plea with Assault with Intent to Commit Penetration or Fourth Degree Criminal Sexual conduct, the defendant would be unable to provide a factual basis to lesser charges because of a lack of force, coercion, or assault.
- A defendant is charged with Carrying a Concealed Weapon, a five-year felony. There is almost no applicable relevant misdemeanor for which a defendant could provide an adequate factual basis.
- A defendant is charged with Assault and Battery or Malicious Destruction of Property. The parties wish to resolve the case with a plea to Disorderly Conduct. But because such a violation requires intoxication in a public place, a defendant might be unable to provide a factual basis to that charge.
- A defendant is charged with Retail Fraud Third Degree. The parties might wish to resolve the case with a plea to a lesser charge of Trespassing. Again, the defendant would be unable to provide a factual basis to the lesser charge.

The Staff Comment to the Proposed Amendment cites concerns with scoring offense variables as a reason to amend the court rules. It is unclear, at least from the perspective of prosecutors, what practical effect these concerns would actually have in practice. Typically, the parties to a plea agreement have calculated sentencing guidelines and anticipated which variables will be scored on the offense as charged, and as pled. The sentencing benefit to the defendant under a plea agreement is usually clear; otherwise, the defendant would not accept the plea. Furthermore, the benefit to the parties of having some flexibility for the factual basis of a plea far outweighs the risk that such a factual basis may create a sentencing guideline issue

in the occasional case. To the extent there is a dispute about the guidelines, it is one that the trial courts are well-equipped to resolve.

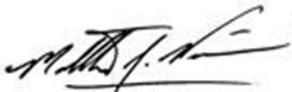
Amending MCR 6.302 and 6.610 as proposed would needlessly frustrate the plea negotiation process and could force defendants who wish to plead to a lesser offense that the prosecutor wishes to offer to proceed instead to trial, simply because they could not make a factual basis without referring to the facts of the initially charged offense. We urge the Court to leave the language of these rules unchanged.

Thank you for your consideration.

Respectfully submitted,



William J. Vaillencourt
Livingston County Prosecutor
President, Prosecuting Attorneys Association of Michigan



Matthew J. Wiese
Marquette County Prosecutor
President-Elect, Prosecuting Attorneys Association of Michigan



Douglas R. Lloyd
Eaton County Prosecutor
Vice President, Prosecuting Attorneys Association of Michigan



Thomas J. Weichel
Alcona County Prosecutor
Secretary-Treasurer, Prosecuting Attorneys Association of Michigan